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IN THE

Supreme Court of the United States

October Term, 1957
No. 684

D. B. LEWIS, President, Lewis Food Company; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANVILLE; JOE LOERA; ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSER; and WALTER SCHMIDT, Secretary-Treasurer of Association of Independent Workers of America,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

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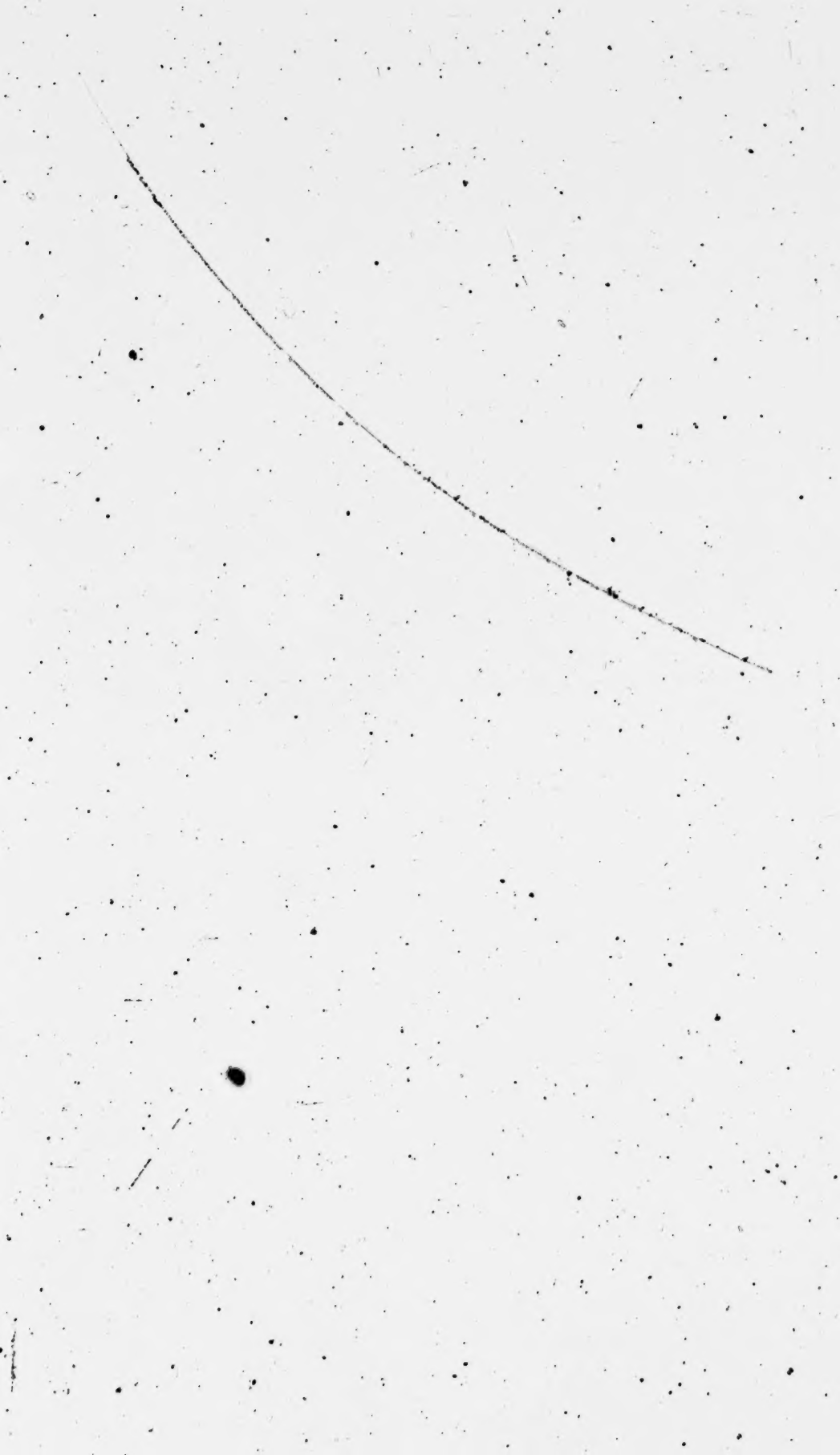

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IN THE

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Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR PETITIONERS.

Opinions Below.

The Opinion of the court below is officially reported at 249 F. 2d 832. The District Court rendered no opinion. The Order of the District Court is set forth at R. 83-84 ["R." references are to the printed transcript of record].

Jurisdiction.

The judgment of the court below was made and entered on October 29, 1957. The petition for writ of certiorari in this cause was filed December 23, 1957. The Order of this court granting certiorari was made and entered January 27, 1958. The jurisdiction of this court is invoked under 28 U. S. C. 1254.

Statutes, Rules and Regulations Involved.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) and of the Board's Rules and Regulations (29 C. F. R. 102.1, *et seq.*, Supp. 1956) are set forth *verbatim* in the body of the brief.

Questions Presented.

At the written request of counsel for the General Counsel, the Regional Director of the Board (at Los Angeles) issued certain subpoenas *ad testificandum* and *duces tecum* directed to petitioners under the seal of the Board and under the facsimile signature of Abe Murdock, a member of the Board [R. 30-43]. Petitioners addressed petitions to revoke subpoenas to the National Labor Relations Board and filed said petitions to revoke subpoenas with the Regional Director. The Regional Director referred the petitions to revoke subpoenas to the Trial Examiner, who denied the petitions. Petitioners refused to obey the subpoenas. The Board filed with the District Court an application for an order requiring petitioners to obey the subpoenas. The District Court issued its order quashing the subpoenas. On appeal to the United States Court of Appeals for the Ninth Circuit, the order of the District Court quashing the subpoenas was reversed.

The questions presented are:

(1) Whether the Board has power under the National Labor Relations Act, as amended, to delegate to subordinates the authority to issue subpoenas;

(2) Whether the Board has power under the National Labor Relations Act, as amended, to delegate to subordinates the authority to rule upon petitions to revoke subpoenas;

(3) Whether under the National Labor Relations Act, as amended, and Board Rules and Regulations, a subpoena may be issued upon the application of an attorney employed by the General Counsel of the Board.

Statement.

On April 30, 1956, the General Counsel of the Board issued through the Regional Director of Los Angeles a consolidated complaint against petitioners alleging unfair labor practices in violation of Section 8(a)(1), (2) and (3) of the Act and Section 8(b)(1)(A) and (2) of the Act. The consolidated complaint was issued and served on petitioners, together with a notice that a hearing would be conducted before a Trial Examiner of the Board on the allegations set forth in the complaint [R. 19-26].

On June 1, 4 and 5, 1956, at the request of an attorney for the General Counsel, the Regional Director at Los Angeles issued subpoenas *ad testificandum* and *duces tecum* directed to petitioners under the seal of the Board and under the facsimile signature of Abe Murdock, a member of the Board [R. 30-43].

On June 11, 1956, petitioners addressed petitions to revoke subpoenas to the National Labor Relations Board and filed them with the Regional Director asserting that

(1) the Board could not delegate its power to issue subpoenas to the Regional Director, and (2) an attorney for the General Counsel is not a party to the unfair labor practice proceedings and hence is not entitled to the issuance of subpoenas. As to the *subpoenas duces tecum*, Petitioners Lewis and Schmidt also challenged the relevancy of the records and documents required to be produced [R. 44-51].

On June 11, 1956, the Regional Director referred the petitions to revoke subpoenas to a Trial Examiner who denied the petitions. Petitioners, nevertheless, refused to obey the subpoenas [R. 51-80].

The Board, by its General Counsel, on June 29, 1956, filed with the District Court an application for an order requiring petitioners to obey the subpoenas involved herein [R. 3-9].

Petitioners resisted enforcement of the subpoenas on the grounds that (1) the Regional Director did not have authority to issue the subpoenas; (2) the Trial Examiner did not have authority to rule upon petitioner's petitions to revoke subpoenas; and (3) an attorney for the General Counsel is not entitled to the issuance of subpoenas upon his application, since he is not a party to the proceedings. The objections to the relevancy of the documents and records required to be produced by the subpoenas addressed to Lewis and Schmidt were not renewed.

On July 30, 1956, the District Court issued its order quashing the subpoenas on the authority of *N. L. R. B. v. Pesante*, 119 Fed. Supp. 444 [R. 83-84]. The *Pesante* case held (1) that subpoenas issued under facsimile of a Board member are valid under the Act; (2) however, that the Board must itself pass upon petitions to revoke subpoenas; and (3) that an attorney

for the General Counsel is not a "party" to a Board proceeding and hence neither he nor the attorneys under his supervision may request subpoenas.

On appeal the Court of Appeals reversed the order of the District Court. The Court dealt only briefly with the question of the power of the Board to delegate authority to issue subpoenas, citing *N. L. R. B. v. John S. Barnes Corp.* (7th Cir.), 178 F. 2d 156, where the Court held that a subpoena issued by a Regional Director under the facsimile signature of a Board member is valid.

On the power of the Board to delegate authority to a Trial Examiner to rule on petitions to revoke subpoenas the Court noted that there was a conflict among the Circuits. The *Pesante* case, *supra,* 119 Fed. Supp. 444, and *N. L. R. B. v. Duval Jewelry Co.* (5th Cir.), 243 F. 2d 427, certiorari granted in the United States Supreme Court, October Term, 1957, No. 234, hold that only the Board itself is authorized by Section 11(1) to hear petitions to revoke subpoenas; on the other hand, the Seventh Circuit takes a different view in *N. L. R. B. v. Gunaca,* 230 F. 2d 542. The Seventh Circuit decision is in accord with the decision in *N. L. R. B. v. International Typographical Union,* 76 Fed. Supp. 895. The Ninth Circuit followed the decision of the Seventh Circuit in the *Gunaca* case, *supra,* 230 F. 2d 542.

The Ninth Circuit Court agrees with petitioners that the statute itself and the legislative history are "somewhat favorable to appellees' [petitioners'] position." However, under a "rule of convenience" the Ninth Circuit finds that a holding that the power to rule on petitions to revoke subpoenas is non-delegable "would substantially impede the effectuation of the Board's primary function." The Court concludes that, since the power to delegate has not been

expressly or impliedly withdrawn under the statute, the Board under its rule-making authority (Sec. 6 of the Act) has the power to make a rule delegating authority to a Trial Examiner to pass upon petitions to revoke subpoenas.

Finally, the Ninth Circuit held that the General Counsel is a party to an unfair labor practice proceeding relying primarily on Section 3(d) of the Act, which gives the General Counsel "final authority on behalf of the Board in respect of the investigation of charges and issuance of the complaints under Section 10, and in respect of the prosecution of such complaints before the Board." The Court distinguished the *Pesante* case, *supra*, which held that a Regional Director of the Board is not a party to a representation proceeding. The Ninth Circuit did not discuss the effect of Section 102.8 of the Board's Rules and Regulations, which does not include General Counsel within the definition of "party."

Summary of Argument.

The terms of Section 11 of the National Labor Relations Act itself demonstrate conclusively that the subpoena power is not delegable. Any person who reads Section 11(1) of the Act must conclude that, without reference to the legislative history, the cases, or other aids to construction, Congress specifically provided for delegation of the subpoena power by the Board when it intended such delegation and omitted the power to delegate when it intended that the Board, or a member thereof, should not delegate. The statute is clear. The Court should not go outside the statute to construe it.

In addition to the clear language of the statute, the legislative history of the Act shows that Congress intended that the power to issue and revoke subpoenas could not be delegated. The original bill, as passed in the House, permitted delegation of the subpoena power. The Senate Bill did not. Section 11(1) of the Act, as finally adopted, is a compromise between the House and Senate versions. The House provision for automatic issuance of subpoenas plus the power to revoke was adopted, but the language of the House version regarding delegation of the subpoena power to a "trial examiner" in the case of issuance of a subpoena and the delegation to "duly authorized agent or agents" in the case of revocation of the subpoena was omitted. The change in language between the original House version and the final statute must lead to the conclusion that Congress did not intend to permit delegation with respect to the power of issuing and revoking subpoenas.

The decision of this Court on the subject of delegation of subpoena power uphold the position of Petitioners. The present case is almost identical to the *Cudahy* case, 315 U. S. 357, and differs substantially from the *Mohawk* case, 331 U. S. 111. A consideration of the five points made by this Court in the *Mohawk* case point to the same conclusion that was reached in the *Cudahy* case, to wit, the subpoena power is not delegable.

The Seventh Circuit decisions in the *Barnes* case, 178 F. 2d 156 and the *Gunaca* case, 230 F. 2d 542, are the decisions relied upon by the court below and the Fifth Circuit in reaching the conclusion that the subpoena power

can be delegated. The decisions of the Seventh Circuit are followed without independent examination of the question. An analysis of the Seventh Circuit decisions discloses that the decisions are wrong, both on principle and precedent. The Seventh and Ninth Circuits have misinterpreted Section 5 when they hold that power of inquiry includes the power to issue subpoenas. The courts have greatly overemphasized Section 6—the rule-making power—and have disregarded the language of the *Mohawk* case in this regard. The Court's argument for flexibility of administration and ease of issuance and revoking subpoenas completely under-emphasizes the importance of the subpoena power and the need to protect individual rights. The courts' attempt to distinguish the *Cudahy* case and reliance on the *Mohawk* case are in complete disregard of the actual decision in the *Mohawk* case.

Finally, we contend that the subpoenas are invalid because they were issued without a proper application therefor. The application was made by an individual who was not a party to the proceedings, contrary to the language of Section 11(d) of the Act, contrary to the language of Section 2(b) of the Administrative Procedure Act and contrary to the Board's own rules and regulations which define the term "party" in Section 102.8. The application for subpoenas was made by an attorney for the General Counsel and such an individual is not a party under the provisions of the statute or rules and regulations of the Board.

In view of the foregoing, this Court should hold that the subpoena power is not delegable, that the subpoenas are void and the case should be remanded to the District Court with directions to quash the subpoena forthwith.

ARGUMENT.

I.

Section 11 of the National Labor Relations Act, as Amended, Shows on Its Face That the Subpoena Power Is Not Delegable.

We contend that the terms of the Act itself demonstrate conclusively that the subpoena power is not delegable. We further contend that the legislative history of the Act and the cases in point also support this view.

Section 11 of the Act provides with respect to the subpoena power as follows:

> "Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—
>
> "(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such

subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agencies designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing."

The Court will note that there are five sentences in subsection (1) of Section 11. The fifth sentence can be disregarded for present purposes. The Court's attention is called to a comparison of the first and fourth sentences as against the second and third sentences.

The first sentence, in providing for the examination of evidence and the right to copy evidence, gives the power to the Board "or its duly authorized agents or agencies" —a clear authority to delegate that power.

The fourth sentence, in providing for the administering of oaths, examination of witnesses and the receiving of evidence, also vests the power in any member of the Board "or any agent or agency designated by the Board for such purposes." Here again the authority given to the Board may be delegated.

On the other hand, the second sentence which provides for the issuance of subpoenas, gives the power only to "The Board, or any member thereof." In the third sentence which provides for revocation of the subpoena, the power is given to "the Board."

The Ninth Circuit Court held below that there is no expressed or implied negation of the power to delegate in the Act. This is contrary to the approach taken in the *Pesante* case, *supra*, 119 Fed. Supp. 444, and the *Duval* case, *supra*, 243 F. 2d 427, where the courts found that the Act itself bars delegation.

It is submitted that any person who reads Section 11 (1) must conclude without reference to the legislative history, cases or other aids to construction, that Congress specifically provided for delegation by the Board when it intended such delegation and omitted the power to delegate when it intended that the Board, or a member thereof, should not delegate. If a statute is clear, the Court need not go outside the statute to construe it.

II.

The Legislative History of the National Labor Relations Act Shows That the Subpoena Power Is Not Delegable.

In addition to the clear language of the statute, the legislative history of the Act establishes that Congress intended that the power to issue subpoenas and to revoke subpoenas could not be delegated. References hereafter are to "Legislative History of the Labor Management Relations Act, 1947, Vol. I (National Labor Relations Board, 1948)."

The first step in the legislative process was H. R. 3020, as reported by the Committee on Education and Labor and as is passed the House of Representatives initially. (Legislative History, *op. cit.*, pp. 74, 201.) This version provided as follows:

> "Sec. 11. For the purpose of any proceeding before the Board, or before a member, examiner, or examiners thereof, or for the purpose of any investigation by the Administrator under section 9—
>
> "(1). The Board, or any member thereof, *or any trial examiner* shall, upon application of the Administrator or any party to such proceedings, forthwith issue to the Administrator or to such party as the case may be, in the name of the Board, subpoenas

requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence or under his control, such person may petition the Board, *or its duly authorized agent or agents,* to revoke and the Board, *or such agent or agents,* shall revoke such subpoena if in its, *his or their* opinion, as the case may be, the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its, *his or their* opinion, as the case may be such subpoena does not describe with sufficient particularity the evidence whose production is required. The Administrator, or any member of the Board, *or any examiner or examiners designated by the Board for such purposes,* may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing." (Emphasis added.)

The language which should be noted particularly is italized.

The original Senate version, S. 1126, as reported by the Committee on Labor and Public Welfare and H. R. 3020 as it passed the Senate initially, both provided as follows (Legislative History, *op. cit.,* pp. 133, 261):

"Sect. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

"(1) The Board, or its duly authorized agents or agencies, shall, at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any persons being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing."

The Court will note that the Senate Bill contained language entirely different from the House Bill.

Section 11(1) of the Act, as finally adopted (29 U. S. C. A. (Supp.), Sec. 161), is a compromise between the House and the Senate versions. The House provision for an automatic issuance of a subpoena plus the power to revoke was adopted, but the language of the House version regarding delegation of the subpoena power to a "trial examiner" (in the case of issuance of the subpoena) and the delegation to "duly authorized agent or agents" (in the case of revocation of the subpoena) was omitted. In addition, the Senate version was changed to permit the Board to issue subpoenas as well as "any member of the Board."

With reference to the legislative history, the Ninth Circuit recognizes that Congressional action was "favorable" to petitioners' position but "inconclusive." Having made the statement, the Court then drops its discussion of Congressional history and applies what we prefer to call a "rule of convenience", finding that it would make it extremely difficult, as a practical matter, for the Board to carry out its functions, if it did not have the power to delegate the subpoena power. In our view, the Seventh and Ninth Circuits are engaging in judicial legislation and have failed to uphold the statute as written.

We submit that the change in language between the original House version and the final statute must lead to the conclusion that the Congress intended to permit delegation with respect to the powers granted in the first and fourth sentences of Section 11(1), but did not intend to permit delegation with respect to the power of issuing and revoking subpoenas contained in the second and third sentences.

The Ninth Circuit Court upheld the Board's delegation of power to revoke subpoenas under the rule-making power vested in the Board by virtue of Section 6 of the Act. An agency rule can not change positive provisions of the statute. The rule-making power can not serve as a source of delegation where the statute expressly, or by implication, withholds such power. *Fleming v. Mohawk Company, supra,* 331 U. S. 111, 121. We submit that the Act and the legislative history thereof clearly indicate that Congress intended that the Board itself exercise the subpoena power and that such power can not be delegated by rule, or otherwise.

III.

The Decisions of This Court Show That the Subpoena Power Is Not Delegable.

This Court has expressed itself on the subject of delegation of the subpoena power in *Cudahy Packing Co. v. Holland*, 315 U. S. 357 and *Fleming v. Mohawk Wrecking and Lumber Co.*, 331 U. S. 111. The Ninth Circuit Court held that these cases are not controlling, since they involved construction of a statute different from the National Labor Relations Act. The statute under construction in the *Cudahy* case, *supra*, 315 U. S. 357, is almost exactly the same as Section 11 of the National Labor Relations Act. We contend that the principles enunciated in the *Cudahy* case, *supra*, 315 U. S. 357, and the *Mohawk* case, *supra*, 331 U. S. 111, are controlling and that a comparison of the two cases will show that the present case is governed by the *Cudahy* case.

The *Cudahy* case held that the Administrator of the Fair Labor Standards Act did *not* have the power to delegate to his subordinates the authority to issue subpoenas. This Court said in part:

> "The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power."

The *Mohawk* case held that the Administrator of the Emergency Price Control Act *was* authorized to delegate to district directors authority to issue subpoenas. This Court, in the *Mohawk* case, approved the *Cudahy* case but held that the *Cudahy* case did not apply to the facts of the *Mohawk* case because of five points discussed in the opinion. Since the *Mohawk* case is later in point of time, and since it distinguishes the *Cudahy* case, we wish

to discuss this Court's reasoning in the *Mohawk* case step by step.

The first point made by this Court in the *Mohawk* case (331 U. S. 111, 120) was that the legislative history of the Fair Labor Standards Act involved in the *Cudahy* case showed that a provision granting authority to delegate the subpoena power had been eliminated when the bill was in Conference. On the other hand, this Court pointed out that the legislative history of the Emergency Price Control Act showed that the Senate Committee report on the bill had stated specifically that the Administrator could delegate any of the powers given to him by such bill. Thus, there are two points of difference in the legislative history of the statutes considered in *Cudahy* and *Mohawk*.

It is apparent that the present case is almost identical with the *Cudahy* situation and is entirely different from the *Mohawk* case. We have already pointed out that the House bill provided for delegation of the subpoena power but that in Conference this provision was eliminated. In the second place, there is nothing in any of the committee reports or in the discussion on the floor of Congress which indicates that the subpoena power can be delegated. Therefore, on the first point of the *Mohawk* opinion, it is clear that the *Cudahy* case controls the present case.

The second point made by this Court in the *Mohawk* case (331 U. S. 111, 121) is that the Fair Labor Standards Act involved in the *Cudahy* decision expressly made delegable the power to gather data and make investigations, this Court in the *Mohawk* case stating that this lends "support to the view that when Congress desired to give authority to delegate, it said so expressly." On the other hand, the Emergency Price Control Act did not

contain a provision specifically authorizing delegation of other functions.

Compare the present Act on this point. Like the Fair Labor Standards Act, the present Act expressly grants the power to delegate in several specific areas. First, Section 3(b) authorizes the Board to delegate any of its powers to any group of three or more of its members. Second, Section 5 provides that the Board may delegate the power to prosecute an inquiry necessary to its functions. Third, Section 11(1) provides that the Board's power to examine evidence can be delegated to its agents or agencies. Finally, Section 11(1) provides that the power to administer oaths, examine witnesses and receive evidence can be delegated to the Board's agents or agencies. Therefore, the principle relied upon by the Court in the *Mohawk* case to support the *Cudahy* result, is applicable to the present case even more so than it was in the *Cudahy* case. Obviously, on this second point of argument, the *Cudahy* case should be followed here.

The third point of this Court in the *Mohawk* case (331 U. S. 111, 121) is that the Fair Labor Standards Act in the *Cudahy* case incorporated by reference certain sections of the Federal Trade Commission Act, whereas the Emergency Price Control Act contained its own description of the subpoena power.

Again, compare the present Act. This Act does not incorporate the provisions of the Federal Trade Commission Act by reference *but in fact copies portions of the Federal Trade Commission Act almost verbatim.* This point appears clearly from a comparison of the pertinent provisions of the three Acts, the Emergency Price Control Act, the Federal Trade Commission Act, and the present Act.

Emergency Price Control Act:

"The Administrator may administer oaths and affirmations and may, whenever necessary, by subpoena, require any such person to appear and testify or to appear and produce documents, or both, at any designated place." (Section 202 of the Act; 50 U. S. C. A. App. Sec. 922)

Federal Trade Commission Act:

"For the purposes of sections 41-46 and 47-58 of this title the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence."

National Labor Relations Act;

Section 11 is quoted in full at pages 9-10 of this Brief.

It is apparent that the language of the present Act is almost exactly the same as that of the Federal Trade Commission Act except that the present Act adds the power to revoke and except that there are natural variations of language due to the different types of operations involved. Also, although we have not set forth the material here, the Court will note that the language used in the Federal Trade Commission Act regarding enforcement of subpoenas, taking of depositions, and immunity of witnesses (15 U. S. C. A. Sec. 49), is almost identical with

subdivisions (2) and (3) of Section 11 of the present Act. We therefore believe that the *Cudahy* case on this ground is clearly applicable to the present case.

The fourth point made by this Court in the *Mohawk* case (331 U. S. 111, 121) is that the Emergency Price Control Act gave the Administrator specific power to issue rules and regulations, whereas the Fair Labor Standards Act did not do so. Without more, the present Act would thus be more like the Emergency Price Control Act because Section 6 of the present Act does give the Board power to issue rules and regulations. However, it should also be noted that this Court in the *Mohawk* case states that the rule making power may give authority to delegate a particular function "unless by express provision of the Act or *by implication*, it has been withheld" (331 U. S. 111, 121) (emphasis added). We have already shown that the first three points relied upon by this Court in the *Mohawk* case prove that the present Act has, by implication, clearly withheld the power to delegate the subpoena authority. Therefore, as this Court in the *Mohawk* case recognized, the mere existence of the rule-making power is not enough to overcome the other factors.

The fifth point mentioned by this Court in the *Mohawk* case as more or less an afterthought, is that the Emergency Price Control Act set up a program which was very broad and extensive—"probably the most comprehensive legal control over the economy ever attemped" (331 U. S. 111, 122)—and that the Administrator of that statute would have had difficulty performing personally all of the investigative functions given to him. The National Labor Relations Board has broad powers and a good deal of work, but it is obvious that its job in handling labor cases is much less extensive than the work performed under the Emergency Price Control Act.

It is, of course, true that if the National Labor Relations Board followed the plain and simple dictates of the Act and subpoenas were issued by the Board or members of the Board, the members would have more work than if they merely signed a stack of subpoenas in blank and did not have to rule upon petitions to revoke subpoenas. But there is good reason why that should be so. The *Cudahy* case stated the principle very well in answer to the argument that it would be hard for the Administrator of the Fair Labor Standards Act to handle the subpoena power personally (315 U. S. 357, 363):

> "The Administrator . . . points to the wide range of duties imposed upon him, the vast extent of his territorial jurisdiction, and the large number of investigations required for the enforcement of the Act. From this he argues that Congress must have intended that he should be permitted to delegate his authority to sign and issue subpoenas. But this argument loses force when examined in the light of related provisions of the Act and of the actual course of Congressional legislation in this field.
>
> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer."

As already stated, the Board relies upon the *Mohawk* case; we rely upon the *Cudahy* case. In light of the five points made by this Court in the *Mohawk* case, we think the conclusion is inescapable that every factor points to the conclusion reached in the *Cudahy* case—the subpoena power is not delegable.

IV.

The Seventh Circuit Decisions Upon Which the Ninth Circuit Relied, and Which Uphold the Authority of the Board to Delegate the Subpoena Powers Are Demonstrably Wrong.

Since the decision of the Court of Appeals of the Seventh Circuit in *N. L. R. B. v. John S. Barnes Corp.*, 178 F. 2d 156, is the decision upon which the courts in other circuits have relied in upholding the authority to delegate the subpoena power, we propose to discuss the *Barnes* case, *supra*, in detail. The *Barnes* case was followed by the Fifth Circuit without any regard to discussion of the point in *J. B. Edwards v. N. L. R. B.*, 189 F. 2d 970, and in *Jackson Packing Co. v. N. L. R. B.*, 204 F. 2d 842. The *Barnes* case, *supra*, was followed by the Seventh Circuit in a later decision in *N. L. R. B. v. Gunaca*, 230 F. 2d 542, which upheld the power of Trial Examiners to rule on petitions to revoke. The Ninth Circuit in the instant case also followed the *Barnes* and *Gunaca* decisions, *supra*, without discussion. The case is relied on heavily by the Board. Since we believe this Court should reach a conclusion contrary to the philosophy and reasoning of the *Barnes* case, we wish to discuss that case point by point.

The Court, in the *Barnes* case, first stated (178 F. 2d 156, 158) that if the language of Section 11 were the only thing to consider, the Court would be "inclined to agree" that the Board has no power to delegate. In our opinion, this is the only correct point made by the *Barnes* case.

In the second place the Court stated (178 F. 2d 156, 159) that the mere fact that certain sections of the Act give authority to delegate does not deprive the Board of the power to delegate other functions. This statement is

much too broad, since the question obviously depends upon the nature of the power which is given expressly and the nature of the power which is attempted to be implied. Also, the statement, as applied to the present situation, is in direct conflict with the decision of this Court in the *Cudahy* case and the view expressed by this Court in the *Mohawk* case as part of its discussion of the *Cudahy* case.

An example which is given by the court in the *Barnes* case of the statement noted above is indicative of the loose reasoning throughout the case. The Court says that Section 9(c)(1) provides that "the Board" shall investigate representation petitions, whereas, the Board actually authorizes its subordinates to investigate. The court then says that no one doubts the authority of the Board to delegate to subordinates the performance of such a function, even though the delegation is not expressly authorized by the Act (178 F. 2d 156, 159). Apparently, the Court assumes that the power to delegate the investigation of representation petitions is implied. Actually, as already noted, Section 5 of the Act provides that the "Board may by one or more of its members or by such agents or agencies as it may designate, pursue any inquiry necessary to its functions in any part of the United States." Section 11(1) states that the Board may delegate the power to examine evidence. This section also provides that the Board may delegate the authority to examine witnesses and to receive evidence.

In view of Section 5 and Section 11(1), it is apparent that the authority to delegate the power to investigate representation petitions is expressly given to the Board and is not, as the *Barnes* case states, to be implied.

The third point made by the court in the *Barnes* case (178 F. 2d 156, 159) is that Section 5, which, as noted

above, gives authority to "prosecute any inquiry", includes the power to issue subpoenas. This is the equivalent of saying that because the Department of Justice can investigate possible violations of law or inquiry into such violations, the Department of Justice can issue subpoenas. Also, Section 5 gives the Board authority to make inquiries and if, as the *Barnes* case states, Section 5 includes the power to issue subpoenas, Section 11 would be superfluous. The fact is that Section 11 was obviously intended to cover the subpoena power specifically and Section 5 certainly was not so intended. We submit that the power to delegate as given in Section 5 regarding inquiries, not only does *not* give the power to delegate the issuance of subpoenas, but actually negates any such implication in Section 11, as the *Mohawk* case points out (331 U. S. 111, 121).

The fourth point of the court in the *Barnes* case (178 F. 2d 156, 159) is that Section 6—the rule-making power—permits the Board to adopt a regulation authorizing a Regional Director or a Hearing Officer to issue subpoenas. Here again, the court in the *Barnes* case, although it quotes the *Mohawk* case, fails to note that the court in the latter case specifically stated that the rule-making power cannot served as a source of delegation where the statute *by implication* withholds such power (331 U. S. 111, 121). We submit that in view of the other factors already noted, the reliance of the court in the *Barnes* case on the rule-making power is entirely unjustified.

The fifth point of the *Barnes* case (178 F. 2d 156, 160) is that "the administration of the Act must be flexible", and if the Board or a member of the Board were required to follow the terms of the statute and to issue the subpoena, the application for the subpoena would have to go

to Washington and it would not be as easy or convenient for parties to obtain subpoenas. We submit that this is further evidence of the loose thinking of a type which has caused some courts to give administrative agencies powers which were never intended by Congress, and which has permitted the bureaucratic processes to usurp functions which traditionally and properly should be reserved to the courts. Despite the *Barnes* case, we believe that the power to issue subpoenas is not analogous to the power of inquiry. It is a power which should not be given lightly. (*Cudahy* case, 315 U. S. 357, 363.)

If, as appears from the statute itself, as the court in the *Barnes* case admits, and as appears from the legislative history, the statute provides that the Board or members of the Board shall issue the subpoenas, what sort of an argument is it which justifies delegation on the basis of convenience. Members of the Board are appointed by the President with the advice and consent of the Senate. (Section 3(a) of the Act). Presumably, the Board is a responsible agency and Congress apparently believed that when the very important subpoena power is given to an administrative agency, convenience is secondary to the fact that responsible persons must exercise the power—not merely any person who might be picked out by the Board. Essentially, the question on this point raised by the *Barnes* case depends upon the importance attached to the subpoena power. The court in the *Barnes* case apparently regards this power as relatively unimportant.

The same sort of argument is made by the court in the next, the sixth point, of the *Barnes* case (178 F. 2d 156, 160). The court says that if the power to issue the subpoena is not delegable, the power to revoke the subpoena likewise is not delegable. That conclusion is exactly correct and is exactly what Section 11(1) says. The court

then states that every petition to revoke would have to be passed upon by at least three members of the Board, which would take so much time that the Board could not perform its other "more important duties."

Again, we submit this shows the lack of importance attached to the subpoena power by the court. We think that the Board can have no more important power than that of using the power of the United States to force the production of evidence by subpoenas. The *Pesante* case, *supra*, 119 Fed. Supp. 444, is a good illustration of the effect of thinking such as that of the Court in the *Barnes* case. In the *Pesante* case, the Regional Director issued twenty-nine *subpoenas duces tecum* directed to twenty-nine companies, in most cases improperly described, mailed the subpoenas to addresses, which in many cases were erroneous, directing the twenty-nine companies to appear at the offices of the National Labor Relations Board in Los Angeles at the same time and place with records and documents so voluminous as, in most cases, would have required a small truck. Some of these companies were located from 300 to 400 miles from the offices of the National Labor Relations Board in Los Angeles. These subpoenas were issued solely to permit an agent of the Board to examine the books and records at his convenience for the purpose of determining whether or not the Board would take jurisdiction of the case. Perhaps if the Board, or a member of the Board, had been responsible for the issuance of the subpoenas, as the statute requires, the processes of the United States would not have been so abused; at least the persons subpoenaed could have petitioned for revocation of subpoenas to the Board with more hope of a responsible determination.

The seventh point of the *Barnes* case (178 F. 2d 156, 160) is that the National Labor Relations Board had

followed the practice of having subpoenas signed in blank and had delegated the power to issue subpoenas as early as 1941, that Congress must have been aware of this practice, and that Congress by amending Section 11 by the Labor Management Relations Act of 1947, impliedly approved the practice of the Board.

There are several answers to this argument. The first is that the rule stated by the court applies only where the statute is ambiguous. An administrative agency cannot expand its powers under a statute by an administrative practice no matter how many times Congress acts to re-enact or to amend such a statute.

The second answer is that when Congress, by action of the Conference Committee, deleted the authority to delegate the power to issue subpoenas as such power was originally set forth in the House Bill, H. R. 3020, and likewise deleted the authority to delegate the power to revoke subpoenas as originally contained in the same Bill, it is certainly clear that Congress did not intend the Board or its members to delegate either issuance or revocation. Whether or not Congress actually knew of the prior practice of the Board, we cannot say, but certainly the language and the legislative history indicate that Congress did not intend to approve any such administrative practice. Presumably, Congress did not feel the need to say to the Board "You cannot delegate", when the language was so clear. Furthermore, as the *Barnes* case points out, Section 11 was changed substantially by the 1947 amendment. Therefore, the argument of implied ratification by Congress of the Board's practice, is not applicable.

A third answer might be that Congress was aware of the *Cudahy* decision (1942) holding that the subpoena power under the Federal Trade Commission Act could *not*

be delegated, and that by adopting language in Section 11 of the present Act so similar to that of the Federal Trade Commission Act (15 U. S. C. A. Sec. 49), Congress, in 1947, impliedly ratified the *Cudahy* decision.

The eighth point of the *Barnes* case (178 F. 2d 156, 161) is that the action of the Board or one of its members in issuing a subpoena is only ministerial, whereas the action of the administrative agency in the *Cudahy* case was discretionary. We submit that when the issuance of the subpoena was made automatic, with the power of revocation, the Congress might well have considered that this would make it even more important to have the power vested in responsible persons, such as the Board or its members, rather than in unknown subordinates. Also, it should be noted that the agency issuing the subpoena must determine (a) whether there is a proceeding pending such as described in Section 11(1) and (b) whether the applicant is a bona fide party to the proceeding. This action is not ministerial. Also, the power to revoke obviously involves an additional amount of discretion, yet on the theory of the *Barnes* case, the power of revocation can also be delegated to any agent the Board wishes to designate. We submit that the issuance of subpoenas is not ministerial, but, in any event, we believe that the history of the protection of individual rights in this country, shows that the subpoena power is more important than the court in the *Barnes* case considers and that administrative agencies should not be given the power lightly.

The ninth point of the case (178 F. 2d 156, 161) is that the *Cudahy* case is not in point because of several factors. First, the court says, in effect, that Section 4 (c) of the Fair Labor Standards Act is not as broad from the stand-

point of delegation as Section 5 of the present Act. Section 4(c) of the Fair Labor Standards Act provides:

> "The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place." (29 U. S. C. A. Sec. 204(c).)

Section 5 of the present Act, as already mentioned above, provides that:

> "The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States . . ."

We submit that the distinction between Section 4(c) and Section 5 is a very weak argument for distinguishing the *Cudahy* case.

The Court also says that in the *Cudahy* case the Supreme Court emphasized that a provision authorizing delegation of the subpoena power had been eliminated when the Bill was in Congress. If the court in the *Barnes* case had inquired, it might have discovered that a provision authorizing delegation was eliminated from the House Bill in the Conference Committee when the present Act was being adopted.

The *Barnes* case also states that in the *Cudahy* case the Supreme Court had stated that such court was not then concerned with the practice of some of the agencies, including the National Labor Relations Board, of delegating the issuance, though not the signing, to subordinates. Does the court in the *Barnes* case mean by this statement

that if, in the *Cudahy* case, the subpoenas had been rubber-stamped in blank and given to subordinates to issue, as done by the National Labor Relations Board, that this Court in the *Cudahy* case would then have approved such issuance of the subpoenas? Such a position seems to be rather silly and not really worth argument. As a matter of fact, the whole point of the *Barnes* case, up to this stage, is that the National Labor Relations Board *has* delegated the issuance of subpoenas. Its reference to the quotation from the *Cudahy* case is meaningless.

The tenth and last point of the *Barnes* case (178 F. 2d 156, 162) is that the *Mohawk* case is the most recent one involving this delegation problem, and the *Barnes* case says:

> "All of the reasons assigned by the Supreme Court for sustaining the validity of the delegation of the subpoena power in the Mohawk case, apply to the instant case, except that the Act here did make expressly delegable certain powers other than the power to issue subpoenas."

If further evidence of the weakness of the *Barnes* decision were needed, it is provided in this final comment. The fact is that the points relied upon by the Supreme Court in the *Mohawk* case, every point but one leads to the conclusion that the *Cudahy* case applies here. The only point as to which the *Mohawk* case is similar to the present case is that in both the Emergency Price Control Act and the present Act, the administrative agency has the rule-making power. And, as the Court in the *Mohawk* case specifically stated, although this was disregarded in the *Barnes* case, the rule-making power cannot be relied upon for authority to delegate where Congress, by implication, has withheld such authority.

We submit that the argument of the Court in the *Barnes* case is replete with inaccuracies, inconsistencies and error. The Court (1) has overlooked Section 5 in the Court's reliance on Section 9(c)(1); (2) the Court has misinterpreted Section 5, when it says that power includes the power to issue subpoenas; (3) the Court has greatly overemphasized Section 6—the rule-making power—and has disregarded the language of the *Mohawk* case in this respect; (4) the Court's argument for flexibility of administration and ease of issuing and revoking subpoenas completely overlooks the importance of the subpoena power and the great need that such power be exercised by a responsible agency and not by every Tom, Dick and Harry, if individual rights are to be protected; (5) the Court's reliance upon the administrative practice prior to 1947 is clearly in error where the Act itself is specific, where Section 11 was revised, and where in conference the delegation provisions were eliminated; (6) the Court's attempt to distinguish the *Cudahy* case and the Court's reliance on the *Mohawk* case are in complete disregard of the actual decision in the *Mohawk* case.

We suppose it is obvious by now that we believe the *Barnes* decision to be one of the most superficial and poorly reasoned decisions to be handed down by a Court of Appeals. The two cases relied upon by the Board from the Fifth Circuit—the *Edwards* case and the *Jackson Packing* case, *supra*, are meaningless, since the Court in those cases blindly relied upon the *Barnes* case without any analysis of the problem. We therefore submit that any true examination of this question can result in only one conclusion—the *Cudahy* case, as interpreted by the *Mohawk* case, is clearly applicable here and the *Barnes* case, and the cases following it, are clearly wrong.

V.

The Subpoenas Are Invalid Because They Were Issued Without a Proper Application Therefor.

Finally, we contend that the subpoenas here involved are invalid because they were issued without a proper application therefor. Section 11(d) of the Act provides that a subpoena shall be issued "upon application of any party to such proceedings." The term "party" is not defined in the Act. Section 2(b) of the Administrative Procedure Act defines "party" as follows:

> "'Party' includes any person or agency named or admitted as a party, or properly acting and entitled as of right to be admitted as a party, in any agency proceeding."

Section 6 of the Administrative Procedure Act provides:

> "Agency subpoenas authorized by law shall be issued to any *party* upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought." (Emphasis added.)

It is clear that under the Administrative Procedure Act the General Counsel and counsel for the General Counsel are not parties to this proceeding since they have not been named or admitted as a party.

Section 102.58(c) of the Board's Rules and Regulations provides that a subpoena shall be issued "upon application . . . in writing by any party." Section 102.8 of the Board's Rules and Regulations provides:

> "The term 'party' as used herein shall mean the regional director in whose region the proceeding is pending, and any person named or admitted as a party, or properly acting and entitled as of right to be admitted as a party. . . ."

The Ninth Circuit Court failed completely to discuss the effect of the Board's own Rules and Regulations which defined the term "party." With reference to the definition contained in the Administrative Procedure Act, the Court below said that the definition "is not decisive."

Under the Board's own definition of "party," as set forth above, it is apparent that the applications for the subpoenas were not made by a "party" as required by the Act and by the regulations. The application for every subpoena was made by E. Don Wilson, described in the subpoenas as "counsel for the General Counsel."

The Ninth Circuit Court found that the General Counsel is a party to an unfair labor practice proceeding under the authority of Section 3(d) of the Act and the Ninth Circuit Court's definition of "party," as including any one taking part in a proceeding. (*Fong Sik Leun v. Dulles*, 226 F. 2d 74, 81.)

The usual legal definition of a "party" certainly does not include an attorney (as such). The generally accepted definition of "party" is entirely at odds with the view that the General Counsel, or his attorney, who are representatives and employees of the Board, are parties. There is no basis for a construction of the word "party" to include persons directly associated with the agency before whom both sides (unions and management) in an adversary proceeding are submitting, or are about to submit, their causes. In the *Pesante* case, *supra*, 119 Fed. Supp. 444, the District Court stated that in its opinion Congress by the Act and the Board by its regulations intended to, and did, leave it up to the adversaries (union and management) to apply for subpoenas.

We contend that the General Counsel is no more a party to this proceeding than would be the Solicitor General in a proceeding brought on behalf of the United States Government. The General Counsel is not a party as defined in the Administrative Procedure Act or the Board regulations. It follows that the subpoenas are invalid because they were issued without a proper application therefor.

Conclusion.

For the foregoing reasons, the judgment of the Court below should be reversed and the case remanded to the District Court with directions to quash the subpoenas forthwith.

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